In the Supreme Court of the United States

OCTOBER TERM, 1963

Nos. 610 AND 628

FIBREBOARD PAPER PRODUCTS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL–CIO, AND UNITED STEELWORKERS OF AMERICA, AFL–CIO

AND

EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL–CIO, AND UNITED STEELWORKERS OF AMERICA, AFL–CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND FIBREBOARD PAPER PRODUCTS CORPORATION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The Board found that the Company refused to bargain in violation of Section 8(a)(5) of the National Labor Relations Act by contracting out its maintenance work to an independent contractor with-

714-193—63

out first bargaining about that decision with the Union,[1] which represented its maintenance employees (J.A. 20, 24–25). However, the Board, finding that the contracting out was motivated by economic considerations rather than by hostility to the Union, dismissed the complaint insofar as it alleged that the Company's action also violated Section 8(a)(3) and (1) of the Act (J.A. 36, 56–60). The Board ordered the Company, *inter alia*, to resume the maintenance operation previously performed by its employees, to offer those employees reinstatement to their former jobs and make them whole for any loss of pay suffered by them, and to bargain collectively with the Union (J.A. 27). The Company petitioned the court of appeals to review the Board's refusal-to-bargain finding, and the Union petitioned to review the dismissal of that part of the complaint alleging violations of Section 8(a)(3). The court of appeals upheld the Board in both respects, and enforced the Board's order in full (Co. Pet. App. 1–9). Both the Company and the Union have now filed petitions for certiorari with respect to the portions of the Board's decision which they contested in the court below.

The basic question presented by the Company's petition is whether an employer violates his bargaining obligation under the National Labor Relations Act when, because of economic considerations, he contracts out to an independent contractor certain work

[1] Petitioners United Steelworkers of America, AFL–CIO, and its affiliate Local 1304, East Bay Union of Machinists.

previously performed by his employees without first bargaining about that decision with the union representing those employees. The holding of the court below that an employer is obligated to bargain about a proposed decision to contract out part of his operation is in direct conflict with *National Labor Relations Board* v. *Adams Dairy, Inc.*, 322 F. 2d 553 (C.A. 8). There the Eighth Circuit held that a dairy was not required to bargain about a decision to terminate its driver-salesmen and replace them with independent contractors, although it was obligated to bargain about the treatment of employees who were terminated by that decision. Moreover, the question is manifestly important in the administration of the Act. Accordingly, although we believe that the decision below is correct, we agree that it is appropriate that this Court resolve the conflict. We therefore do not oppose the grant of the Company's petition with respect to questions 1 and 3 (Co. Pet. 2).[2]

However, we submit that neither the remaining questions presented by the Company, nor the questions raised by the Union warrant review by this Court.

1. There is no merit to the Company's contention (Co. Pet. question 2, pp. 2, 18–20) that the court be-

[2] Question 1 presents the substantive question outlined above, and question 3 the related remedy problem—i.e., whether, assuming the refusal to bargain about contracting out violates the Act, the Board may properly order that the discontinued operation be resumed and that the former employees be reinstated with back pay.

low upheld the Board on a rationale different from that of the Board. The Board found that the Company violated the Act by contracting out its maintenance work without first negotiating or bargaining with the Union about that decision (J.A. 20, 24–25). The court adopted this finding (Co. Pet. App. 5, 8). Although the court pointed out that the Company did not bargain to an impasse before so doing (Co. Pet. App. 6), it was not thereby suggesting that the parties must bargain to a general impasse on all subjects before the employer would be free to contract out an operation. The court was merely indicating that bargaining about the subject of contracting requires not only that the employer notify the union of his intention to contract out, but that he withhold a final decision until he has discussed the subject with the union and exhausted every reasonable prospect of reaching an agreement on the issue. This much is implicit in the Board's position, too.

2. The Company further contends that the Board erred in denying its request to reopen the record for additional evidence, and in unduly delaying action on the motions for reconsideration (Co. Pet. question 4, pp. 2, 23–26). These contentions are likewise without merit. The evidence which the Company sought to adduce was for the purpose of showing that it now needed fewer maintenance employees than previously because certain manufacturing operations had been discontinued and others had been transferred to another plant. Assuming this to be so, it would not

render the reinstatement and back pay provisions of the Board's order inappropriate, but at most would diminish the number of jobs affected by the order. In these circumstances, it was within the Board's discretion to conclude that the details of compliance should be worked out in the supplemental Board compliance proceedings.

Nor is there any merit to the contention that the Board's order is invalid because the Board's delay in deciding the motions for reconsideration violated Section 6(a) of the Administrative Procedure Act, which provides that an agency shall "proceed with reasonable dispatch to conclude any matter presented to it." That provision is designed to avoid needless delays in administrative determinations, and it may afford a basis for compelling administrative action which is being withheld unreasonably. In the present case, however, the Board did act with "reasonable dispatch" in its handling of the motions for reconsideration. The Board originally had held, by a four-to-one vote, that the employer's refusal to bargain about the decision to turn over the maintenance work to an independent contractor did not violate Section 8(a)(5). Both the General Counsel and the Union sought reconsideration. Due to changes in the membership of the Board and the disqualification of one member to participate in the case,[3] the agency was

[3] Member Brown, who had been appointed to the Board after the original decision, was disqualified because he had been the Regional Director who signed the complaint.

equally divided, even though a majority of the Board as then constituted was of the view that an employer has an obligation to bargain about making a decision to contract out an operation. In these circumstances the agency did not abuse its discretion in postponing its decision on the motions of reconsideration until, as a result of another decision, the majority view could be applied in the present case.[4] It was because of this delay that the Board provided for back pay only from the date of the supplemental decision on reconsideration, rather than from the date of the original violation.

3. The Union's petition is directed principally to the Board's dismissal of the Section 8(a)(3) allegation.[5] The Union draws a distinction between contracting out which is motivated by a desire to obtain more favorable terms and conditions of employment

[4] In *Town and Country Manufacturing Company, Inc.*, 136 NLRB 1022, 1026–1028, decided following the change in the agency's membership referred to in the text, a majority of the Board ruled that an employer who refused to bargain about the making of a decision to contract out an operation violated Section 8(a)(5), and overruled the Board's original decision in the present case to the extent that it held to the contrary. Following the *Town and Country* decision and in reliance thereon, a three-member panel of the Board, to whom the present case had been assigned, issued the supplemental decision (from which one member dissented).

[5] The Union also contends (Union Pet. 2, question 2) that the Board abused its discretion in tolling the back pay period until after issuance of its supplemental decision and order. This question obviously is not of sufficient importance to afford an independent basis for certiorari. Indeed, the Union merely raises the question and does not discuss it further in the body of its petition.

and that which is motivated by other advantages. It contends that, where the motive is the former, the contracting out necessarily discriminates against the employer's employees because of their union membership (for this is the factor which has kept his labor cost higher than that of the outside contractor), and therefore the action violates Section 8(a)(3) even though the employer did not have an anti-union intent (Pet. 16–17). The Board, in dismissing the Section 8(a)(3) portion of the complaint, did not discuss the distinction which the Union seeks to draw; it merely held that, since the Company's motive was economic and not anti-union, the contracting out did not violate Section 8(a)(3). However, even assuming that the distinction which the Union makes is a valid one, the record in this case does not support its assumption that terms and conditions of employment were the sole, or even the chief, reason for the Company's decision to contract out its maintenance work. For example, the correspondence between Fluor, the independent contractor, and the Company suggests that at least one of the ways in which money was to be saved was by the use of "effective preplanning and scheduling efforts along with carefully organized material controls" (J.A. 149). Any savings thus effected would be attributable to efficiencies in areas other than terms and conditions of employment. In sum, the issue which the Union seeks to raise is not presented on the record here.

For these reasons, we do not oppose the grant of the Company's petition with respect to questions 1 and 3. The Company's petition should be denied in all other respects, and the Union's petition should also be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
National Labor Relations Board.

DECEMBER 1963.

U.S. GOVERNMENT PRINTING OFFICE: 1963